

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i> ,)	
)	
Defendants.)	
)	

**DEFENDANT TYSON FOODS, INC.’S REPLY ON MOTION TO COMPEL
PRODUCTION OF PEER REVIEW MATERIALS**

Defendant Tyson Foods, Inc. (“Tyson”) respectfully replies to Plaintiffs’ Response on Tyson’s Motion to Compel Production of Peer Review Materials (Dkt. #1884) (hereinafter “Response”). Plaintiffs’ Response is long on outrage but short on law. While Plaintiffs attempt to convert a simple discovery dispute into a debate on professional and scientific ethics, they fail to meet the central thrust of Tyson’s Motion to Compel (“Motion”)—that Plaintiffs have unreasonably delayed production of materials they are obliged to produce in this case. Moreover, despite their tardy production of some peer review materials after the filing of Tyson’s Motion, Plaintiffs still have not met their obligations. Accordingly, an order to compel production is appropriate.

INTRODUCTION

As we explained in our Motion, Plaintiffs have made repeated efforts to secure peer reviewed publication of the work of some of their experts in an effort to evade the likely (and already partially successful) *Daubert* challenges to the admissibility of their opinions. *See* Order & Opinion, Dkt. No. 1765 (Sep. 29, 2008) (finding Professor Harwood’s and Dr. Olsen’s testimony to be unreliable under *Daubert*). Plaintiffs now attempt to distance themselves from

these efforts, suggesting that these were simply the independent actions of their experts. *See, e.g.*, Response at 2 (“Dr. Harwood, *not* the State, independently submitted a manuscript. . . .”).

Plaintiffs’ protestations of innocence are belied by their own materials, which show a calculated and coordinated effort to secure peer review for purposes of this litigation. Indeed, in the words of Dr. Roger Olsen, Plaintiffs’ principal coordinating expert in this case, “[w]e are trying to get papers into peer reviewed journals.” Reply Ex. A at 1. And as his colleague, Dr. Tim Cox, observed, “[i]t sounds like it would be beneficial *to the case* to get some of this stuff published.” *Id.* (emphasis added). Indeed, among the first people Professor Harwood notified upon submitting her manuscripts and learning of their rejection was Plaintiffs’ counsel. *See* Motion Ex. B at Harwood-CORR00000085.0001; Reply Exs. B, C. As part of Plaintiffs’ coordinated effort to secure peer reviewed publications, Professor Harwood, Dr. Olsen, and their colleagues, prepared manuscripts and presentations describing her work on this case. Motion at 4-5; Motion Ex. C at 14-15; Motion Ex. I at 44-46. Dr. Olsen’s papers included an outline of an article for publication describing some of his work in this case. *See* Reply Ex. D.

In light of Plaintiffs’ apparent efforts to develop peer reviewed publication, on April 3, 2008, Defendants served discovery seeking the production of materials provided to any journal, publication, or other entity, relating to any submission or draft manuscript. Motion at 3-4. As Plaintiffs recount, they did produce some materials responsive to these requests. For example, they produced a manuscript submitted by Professor Harwood to the *Journal of Applied and Environmental Microbiology* (“Journal”). This manuscript, which was submitted to the Journal on June 11, 2008, was produced to Defendants on the evening of July 16, 2008, barely a day before Professor Harwood’s deposition. *See* Motion Ex. B at HarwoodCORR00000085.0001. At her deposition, Professor Harwood agreed to produce the names of the individuals she

recommended as peer reviewers. *See* Motion at 4-5; Reply Ex. E at 15:14-21. Plaintiffs' counsel waived any need for a formal discovery request, and an informal request was duly lodged. *Id.* at 15:25-16:11; Reply Ex. F.

Plaintiffs represent that thereafter "[t]here was very little activity in the peer review context." Response at 3. Yet, in January 2009, when Defendants took the deposition of Dr. Bernard Engel, another of Plaintiffs' testifying experts, he admitted having reviewed and edited at least two different articles co-authored with various of Plaintiffs' experts, including Dr. Olsen. *See* Reply Ex. G. This confirmed Defendants' belief that Plaintiffs' effort to secure peer review was systematic and ongoing. Counsel for Tyson specifically requested production of these materials, noting that Plaintiffs were ignoring an outstanding discovery request. *Id.* at 14-18.

Despite repeated inquiries into the status of Defendants' various open discovery requests for materials pertaining to drafts, manuscripts, and peer review materials, Plaintiffs resolutely refused to make such a production in a timely manner. Motion at 6-7. Finally, on February 12, 2009, Defendants filed their Motion to Compel. Within days, Plaintiffs finally produced some materials related to the rejection of Professor Harwood's manuscripts. *See* Reply Ex. H.

Substantial questions remain regarding Plaintiffs' production. Plaintiffs have been coy in describing the documents produced and in characterizing their discovery obligations. They have produced some responsive materials, but demonstrably not all. And, they have declined to make clear representations as to what documents may or may not yet exist to be produced. As explained below, Defendants' demands remain very much live, timely, and relevant.

ARGUMENT

Defendants’ outstanding discovery requests of April 3, 2008, sought materials regarding articles—whether draft or otherwise—relating to the work or opinions of Dr. Olsen or Dr. Harwood in this case and shared with any journal, publication or other entity. Motion at 3-4.

A. Plaintiffs Have Not Met Their Burden With Regard to Dr. Olsen

Plaintiffs assert that as regards Dr. Olsen there is no production to be made because “to date [he] has not corresponded with any scientific journal or submitted any manuscript for consideration.” Response at 11; *see also id.* at 2. This representation, however, does not close the book on Plaintiffs’ discovery obligations with regard to Dr. Olsen.

First, as Dr. Olsen’s and Dr. Engel’s admissions discussed above make clear, Dr. Olsen has drafted, edited, revised, or is otherwise associated with at least one and possibly more draft articles pertaining to his work and opinions in this litigation. *See* Exs. A, D, F. By Dr. Olsen’s own admission these articles were intended for submission to peer review. *See* Ex. A. These articles, and any associated materials, therefore, clearly come within the meaning of Defendants’ discovery requests. And at any rate, defense counsel specifically called for their production at Dr. Engel’s deposition. *See* Ex. G at 15:25-16:11. Plaintiffs have yet to comply.

Second, Plaintiffs treat Defendants’ requests as seeking only materials actually in Dr. Olsen’s possession or personally submitted to a journal by Dr. Olsen. Response at 2, 11. Plaintiffs play word games, assuring the Court that Dr. Olsen himself “has not corresponded with any scientific journal or submitted any manuscript for consideration.” Response at 11. But Defendants’ requests were substantially broader, and requested all materials relevant to any draft or submitted article from any of Plaintiffs’ agents pertaining to any of Plaintiffs’ experts’ opinions and work developed in this litigation. Motion at 3-4; Motion Ex. A at 7. Whether Dr. Olsen himself personally communicated with another journal or entity, or himself personally

pressed the “submit” button is not the limiting factor. For example, if Dr. Engel or Dr. Cox engaged in correspondence regarding or submitted a draft article that pertained to Dr. Olsen’s work—such as the articles they admit having drafted and edited—those materials would fall squarely within Defendants’ discovery requests. Plaintiffs also note only that Dr. Olsen has not communicated with any other entity “to date.” But Defendants’ requests were not limited to submitted materials, but would include draft articles prepared in anticipation of submission that have been shared among Plaintiffs’ consultants. Motion at 3-4. Plaintiffs must produce such materials.

Finally, Plaintiffs acknowledge having retained an as-of-yet unnamed expert to review Dr. Olsen’s work, but take the position that materials from such a “consulting expert” are beyond the reach of discovery requests. Response at 9. This argument is incorrect. First, contrary to Plaintiffs’ assertion, *id.*, Defendants have requested such materials. Defendants requested communications, materials, and submissions “made available to any ... entity.” Because Defendants have no idea who or what Plaintiffs’ secret consultants are, Defendants purposefully worded these requests broadly. The term “entity” includes “[a] real being. . . . Entity includes person, estate, trust, governmental unit.” BLACK’S LAW DICTIONARY 532 (6th ed. 1990). Indeed, “entity” includes anything “that has a real existence.” RANDOM HOUSE COLLEGE DICTIONARY 441 (rev. ed. 1988). Surely this covers Plaintiffs’ confidential expert(s).

Plaintiffs are also wrong that any such materials are protected by the work product privilege. It is true, as Plaintiffs argue, that work product protections reach an attorney’s agents. Response at 10 (citing *B.H. v. Gold Fields Mining Corp.*, 239 F.R.D. 652, 655 (N.D. Okla. 2005)). But, as this Court went on to note in *Gold Fields*, “[w]ork-product protection is not absolute.” 239 F.R.D. at 655. Indeed, the Court listed numerous exceptions and conditions

under which a party is deemed to have waived the protection. *Id.* Specifically, waiver may occur: ““when the covered materials are used in a manner that is inconsistent with the protection,”” *id.* (quoting *Bank of America v. Terra Nova Inc. Co.*, 212 F.R.D. 166, 170 (S.D.N.Y. 2002); “where a party injects the subject matter of work-product into litigation or other adversary proceedings, *id.*; and where the party claiming protection “makes a partial disclosure of work-product,” *id.* These exceptions all apply in this instance.

Any papers in such a consultant’s possession that relate to Plaintiffs’ effort to secure peer reviewed publication of materials related to or derived from their experts’ work in this case must be produced. For example, it would be manifestly unfair and inconsistent with the work product privilege for a consultant to review Dr. Olsen’s work and then publish under the consultant’s own name a manuscript regarding Dr. Olsen’s work, particularly in light of Drs. Olsen, Engel, and Cox’s admissions that they are working together on articles. *Gold Fields*, 239 F.R.D. at 655. Plaintiffs certainly would rely on such an article to support Dr. Olsen’s work, thus injecting the consultant’s work into the litigation. *Id.* Similarly, it would be unfair for such a reviewer to in any way contribute to Dr. Olsen’s work or any proposed article and yet hide behind the work product privilege. Such materials must be disclosed if they exist.¹

¹ Plaintiffs note the possibility that their “consulting experts” may testify at any *Daubert* hearing relating to the reliability of Dr. Olsen’s opinions. Response at 9. If such a hearing is held, and if these individuals are permitted to testify (despite not having been identified in any prior filing or submission, including on Plaintiffs’ final witness list), Defendants will be entitled not only to materials relating to manuscripts but indeed to all of their relevant papers. As this Court recognized in *Gold Field*, “clearly a witness cannot offer testimony based on documents that he simultaneously claims are protected work-product.” 239 F.R.D. at 658. Indeed, “[a] party cannot use work-product as a sword and at the same time invoke the work-product doctrine as a shield to prevent disclosure of the same or related materials.” *Id.*

B. Plaintiffs Have Not Met Their Burden With Regard to Professor Harwood

With regard to Professor Harwood, Plaintiffs explain in their Response that they have now produced materials relevant to the Journal's rejection of Professor Harwood's manuscript. Response at 7-8, 11. Plaintiffs argue this moots the Motion. *Id.* at 11-13. Again, this is not so.

First, Plaintiffs have not produced all materials related to Professor Harwood's submission. Plaintiffs explain that after receiving notice of the Journal's rejection, they gathered materials from Professor Harwood and Dr. Jennifer Weidhaas, a co-author. *Id.* at 7. But the manuscript had four authors, not two. *See* Motion Ex. B at Harwood00000092.0001. Yet no mention is made of any effort to gather relevant materials from the other authors, Dr. Tamzen Macbeth and Dr. Roger Olsen. Nor have Plaintiffs complied with the promises they made to name the individuals Professor Harwood recommended as peer reviewers when she first submitted her manuscript. *See* Motion at 4-5; Reply Ex. E at 15:14-21; Reply Ex. F.

Second, as with Dr. Olsen, Plaintiffs are obliged to produce not just materials from Professor Harwood, but materials from any expert or agent that relates to any manuscript based in whole or in part on, or contributing to, Professor Harwood's work. Plaintiffs have admitted to retaining another expert, Dr. Mike Sadowsky, to review Professor Harwood's work. For all of the same reasons described above with regard to Dr. Olsen's shadowing expert, Dr. Sadowsky's papers must be produced.

Moreover, with regard to Dr. Sadowsky, Plaintiffs have waived any claim to work product protection by partial disclosure. It appears that when he was first retained, Plaintiffs intended to keep him segregated from Northwind, which undertook Professor Harwood's lab work. *See* Ex. I at 1 ("I think I should be a go-between, that way there can be no question that his lab ever had contact with your lab."). But that arrangement soon broke down as Plaintiffs'

discovery includes a substantial volume of substantive communications between Professor Harwood, Professor Sadowsky, Northwind, and Plaintiffs' counsel. *See, e.g.*, Reply Ex. J (sample of such communications). “[A]ny ambiguity as to the role played by the expert when reviewing or generating documents should be resolved in favor of the party seeking discovery.” *Id.* at 660 (quoting *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. of N.Y., Inc.*, 171 F.R.D. 57, 62 (S.D.N.Y. 1997)). Dr. Sadowsky has played a substantive role in the development of Plaintiffs' testifying experts' opinions; certainly, then, any materials relevant to the same subjects and relating to peer review must be produced.

C. Plaintiffs Cannot Refuse To Produce Relevant Materials Until Completion of The Peer Review Process

Finally, Plaintiffs are wrong that they are entitled to delay the production of any additional materials related to peer review until a journal to which a manuscript is submitted makes a final determination as to publication.

Plaintiffs argue that their delays were appropriate pursuant to *In re Bextra & Celebrex Marketing Sales Practices & Products Liability Litigation*, 249 F.R.D. 8 (D. Mass. 2008), and *In re Bextra & Celebrex Marketing Sales Practices & Products Liability Litigation*, 2008 WL 4345158 (N.D. Ill. March 14, 2008). But as we explained in our Motion neither case establishes a generalized privilege for peer review materials, especially where, as here, Defendants have sought only materials in Plaintiffs', not the Journal's, possession. Motion at 15-18. Plaintiffs admit these materials are discoverable, yet present no legal basis that justifies their failure to produce them for months on end.

Plaintiffs' expressed concern for protecting the integrity of the scientific review process from the machinations of lawyers rings hollow under the circumstances that occasioned Defendants' Motion. *See* Response at 2-6, 11-13. The very purpose of peer review is to confirm

the validity of the conclusions an author purports to draw. It is fully consistent with this truth-seeking process to ensure that the reviewer possesses all of the relevant data and observations. Yet Plaintiffs' experts submitted an article based on only a small portion of the data, which presented a substantially more favorable picture of Plaintiffs' results than the full dataset. Motion at 5-6. That is hardly consistent with truth-seeking. Accordingly, Defendants wrote to the Journal to round out the record. *See* Motion Exs. H, J. Defendants fully disclosed that their submissions were from defense experts, and did nothing more than invite full and fair peer review of all of the data.

Plaintiffs now accuse Defendants of having made inaccurate representations, distorting the review process. *See* Response at 3-4. But nothing prevented Plaintiffs from correcting any inaccuracies. At any rate, Defendants' communications are fully vindicated by the conclusions of the independent reviewers who examined Professor Harwood and Dr. Olsen's manuscript and reached many of the same conclusions as Defendants. Reviewers noted: that the allegedly poultry-specific biomarker was not in fact poultry-specific, Ex. K at 2; that the work "represent[ed] an uncontrolled trial from which no conclusions regarding the utility of the assay can be extracted," *id.* at 4; that the manuscript repeatedly employed "biased language," *id.*; the authors' failure to account for alternative sources of bacteria or to develop appropriate correlations, *id.* at 2, 5; and that correlation with indicator bacteria "does not provide any evidence of human health risk," *id.* at 5-6. One reviewer concluded that "the evidence presented in this paper does not indicate that use of the marker is sufficient to quantifiably track poultry fecal sources in environmental waters." *Id.* at 11. And another concluded that the authors' statistical correlations were "meaningless." Reply Ex. C at 2.

In light of these reviews, the Journal concluded that Professor Harwood's first manuscript "was inadequate, and in some cases inappropriate, for a scientific journal." *Id.* at 1. The Journal similarly rejected Professor Harwood's second manuscript:

One of the most serious concerns is the potential for application of the method to other geographic regions, as other studies have shown that these biomarkers lose specificity when tests are conducted using samples from a broader geographic field regardless of the assurance made that these primers may have a broader application. Other concerns are over the lack of necessary controls and the lack of appropriate statistical analyses to support your conclusions. For these reasons, and the reasons in the attached reviews, I am unable to accept your manuscript for publication. As this is the second rejection of this manuscript for scientific reasons, per AEM policy, you may not resubmit the manuscript to any ASM journal.

Reply Ex. C at 1. Defendants never saw or commented on this second manuscript because Plaintiffs concealed it from discovery.

Plaintiffs' claim that they should be able to submit articles to journals for peer review and publication without disclosing the fact, thereby preventing Defendants from ensuring that reviewers have a full record, must be rejected. Defendants fully respect the peer review process; however, Defendants also have a right to ensure that Plaintiffs cannot simply manufacture peer-reviewed evidence on a selective record. Therefore, Plaintiffs should be required to produce manuscripts and related materials contemporaneous with submission and no later.

CONCLUSION

For the foregoing reasons, Defendants respectfully petition the Court to order Plaintiffs to fully respond to Defendants April 3, 2008, and related, discovery requests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 27th of February, 2009, I electronically transmitted the attached document to the court's electronic filing system, which will send the document to the following ECF registrants:

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